Supreme Court, U.S.
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No. 09-601

In The
Supreme Court of the United States

VOLVO CONSTRUCTION EQUIPMENT NORTH AMERICA, INC.,
Petitioner,

v.

ISAAC ROSE, PEGGY H. KNOX, JOSEPH E. HENDERSON, WILBERT WHITT, OPAL B. WHITT, ANDREW J. BERGANT, JR., A.C. WADE, METRO BURTYK, INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Sixth Circuit correctly applied ordinary principles of contract interpretation to determine that the 1983 collective bargaining agreement vested retiree health and life insurance benefits.

PARTIES TO BRIEF

Respondents in this case are Isaac Rose, Peggy H. Knox, Joseph E. Henderson, Wilbert Whitt, Opal B. Whitt, Andrew J. Bergant, Jr., A.C. Wade, Metro Burtyk, and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America. Respondents were plaintiffs-appellees below.

In this brief Respondents are referred to as "Retirees" or "Plaintiffs."

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COUNTERSTATEMENT OF THE CASE

I. INTRODUCTION

For a period of time in the last century, through collective bargaining, some employers promised to provide retiree benefits to their employees. As those employees retired and the cost of retiree benefits began to soar, some employers attempted to limit or avoid those obligations. Those attempts led to a number of retiree benefit cases around the country.

In resolving those disputes, the circuits unanimously endorsed the core rules of contractual interpretation to be applied in these cases. To be expected, minor differences existed initially in the various articulations of those rules from circuit to circuit. As this area of the law matured, however, the circuits themselves recognized that no conflict exists. All circuits agree on the applicable rules of contract interpretation in these cases, and none have adopted any outcome-determinative rule.

The core rules of interpretation which have been unanimously endorsed by the circuits are pure hornbook law: 1) unlike pension benefits, welfare benefits do not automatically vest;[1] 2) the parties to a

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[1] *Reese v. CNH Am. LLC*, 574 F.3d 315, 321 (6th Cir. 2009); *Helwig v. Kelsey Hayes*, 93 F.3d 243, 248 (6th Cir. 1996); *In re Lucent Death Ben. ERISA Litig.*, 541 F.3d 250, 253 (3d Cir. 2008); *UAW v. Skinner Engine Co.*, 188 F.3d 130, 137 (3d Cir. 1999); *Nichols v. Alcatel*, 532 F.3d 364, 377 (5th Cir. 2008); *Machinists v. Masonite Corp.*, 122 F.3d 228, 231 (5th Cir. 1997); *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 604-605 (7th Cir. 1993); *Bland v. Fiatallis N. Am., Inc.*, 401 F.3d 779, 783 (7th Cir. 2005); and

collective bargaining agreement may nevertheless agree to vest retiree welfare benefits;[2] and 3) extrinsic evidence may be considered if a contract is ambiguous on the question of whether parties intended retiree benefits to vest.[3] Each of the circuits has applied these rules to widely varying factual situations. All have reached results consistent with their sister circuits.

II. FACTS

A. The Plant, the Parties and their History

Since at least the 1950s, Volvo Construction Equipment North America, Inc. ("VCENA") and various other corporate entities owned and operated a plant in Euclid, Ohio involved with heavy truck manufacturing, engineering, and testing ("Euclid Facility"). Pet. Appx. 6a. The Plaintiffs are a class of retirees (and their spouses and dependents) who retired from the Euclid Facility by 1987, either before or while it was owned by VCENA. By virtue of the 1983-1986 collective bargaining agreement negotiated

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Anderson v. Alpha Portland Indus., Inc., 836 F.2d 1512, 1516 (8th Cir. 1988).

[2] *See UAW v. Yard-Man*, 716 F.2d 1476, 1479 (6th Cir. 1983); *UAW v. Skinner Engine Co.*, 188 F.3d at 138; *Machinists v. Masonite Corp.*, 122 F.3d at 231; *Bland v. Fiatallis N. Am., Inc.*, 401 F.3d at 783; *Bidlack v. Wheelabrator Corp.*, 993 F.2d at 607; *Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d at 1517.

[3] *See Cole v. ArvinMeritor, Inc.*, 549 F.3d 1064, 1070 (6th Cir. 2008); *Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571, 579 (6th Cir. 2006), cert denied, *CNH Am. LLC v. Yolton*, 549 U.S. 1019 (U.S. 2006); *Bidlack v. Wheelabrator Corp.*, 993 F.2d at 607; *Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d at 1516.

by the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America ("UAW") on their behalf, the Plaintiffs were promised lifetime health insurance benefits and life insurance benefits for the lifetime of the retirees (not their spouses).

The contractual language that established lifetime retiree benefits is nearly identical to the contractual benefits language negotiated nationally by the UAW with a number of companies and had been included in the Euclid Facility's collective bargaining agreements for decades.

As explained by Thomas Tupa, who held the position of either Director and/or Vice President of Human Resources at the Euclid Facility for thirty-nine years and was a member of the company's negotiating committee that negotiated the 1983 CBA, the retiree benefits language came from a "pattern contract" that was first negotiated in 1965 when the Euclid Facility was a division of General Motors. When the Euclid Facility left General Motors "we signed a memorandum of understanding and took the then existing contract from GM. So we had a GM contract, but we weren't GM. So we never substantially broke the GM pattern." *See* Tupa Deposition Transcript, at pp. 10-11, 17, 32.

VCENA was operating under the name Clark Michigan Company in 1984 when it purchased the assets of the Euclid Facility and expressly assumed the 1983-1986 CBA. Pet. Appx. 6a. Years later, VCENA sold its interest in the Euclid Facility to Euclid Hitachi Heavy Equipment, Inc. ("EHHE"). By

the time VCENA transferred its ownership interest to EHHE, all the Retirees had already retired.[4]

The buyer of VCENA's interest in the Euclid Facility entered into an asset purchase agreement with VCENA in which, *inter alia,* it assumed VCENA's obligations for retiree benefits. However, neither the UAW nor the Retirees ever released VCENA from its obligation to provide those benefits. This was of no moment because over the years, on behalf of VCENA, EHHE continued to provide the contractual benefits to the Retirees. EHHE also negotiated new CBAs with the UAW, but none of those CBAs covered the Retirees who already had retired by that time.[5]

This all changed when in 2005 EHHE announced that it had unilaterally decided to cease paying health and life insurance benefits for the Retirees. Plaintiffs protested both to VCENA and EHHE. Although EHHE agreed to negotiate some resolution with the UAW, VCENA completely denied any liability. Subsequently, the Plaintiffs filed the instant lawsuit against VCENA while the UAW continued to negotiate

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[4] VCENA's suggestion that it was not bound to the 1983 collective bargaining agreement and never employed any of the Retirees is incorrect.

[5] VCENA's statement that it was "without authority or standing to bargain for the continuation, modification or cessation of the retiree welfare benefits in subsequent collective bargaining agreements", Pet. 10, is true but irrelevant because no one, including VCENA's successors and the UAW, had the authority to modify the retirees' benefits that had already vested when those employees retired before VCENA terminated its ownership interest.

a resolution with EHHE.[6] Ultimately, partial settlement was reached with EHHE, but the Plaintiffs were forced to fully – and successfully – litigate their claim against VCENA.

B. The CBAs and the Decisions Below

In granting and affirming Plaintiffs' motion for summary judgment,[7] the courts below conducted a detailed analysis of the explicit language of the collective bargaining agreement in order to determine the parties' intent and concluded that the retiree benefits were vested for life.

The 1983 CBA contained a section entitled "Pension Plan, Insurance Program and Supplemental Unemployment Benefit Plan" that stated, "The parties have provided for a Pension Plan, an Insurance Program and a Supplemental Unemployment Benefit Plan by Supplemental Agreements signed by the parties simultaneously with the execution of this Agreement." (6th Cir. Appx. 85) The specific language regarding those fringe benefits was set forth in these Supplemental Agreements.

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[6] VCENA incorrectly states that under the settlement, EHHE "sent Respondents in VCENA's direction to pursue any additional recovery." Pet. 10. In fact, the instant lawsuit already was pending at the time the settlement was reached. The settlement merely preserved Plaintiffs' rights to continue to pursue VCENA for their full benefits.

[7] The District Court granted summary judgment. Pet. Appx. B. The Sixth Circuit affirmed in an unpublished opinion, expressly adopting the decision of the District Court. Pet. Appx. A.

Article III, Section 5(a) of the Supplemental Agreements promises retiree health care benefits to Plaintiffs during retirement:

> **Continuance of Health Care (Other than Vision) Coverages Upon Retirement or Termination of Employment at Age 65 or Older**
>
> (a) Health Care Coverages, an employee has under this Article at the time of retirement or termination of employment at age 65 or older for any reason other than a discharge for cause with insufficient credited service to entitle him to a benefit under Article II of the Euclid, Inc., Hourly-Rate Employees Pension Plan ***shall be continued thereafter*** provided that suitable arrangements for such continuation can be made with the local plans, or insured plan. Contributions for coverages so continued shall be in accordance with Article I, Section 3(b)(7).

(6th Cir. Appx. 261)(emphasis added).

The obligation to provide health care benefits includes contributions for any eligible spouses, surviving spouses and dependents of those retirees. Article I, Section 3(b)(8) of the Supplemental Agreements states:

> (8) For Surviving Spouses:
>
> (i) The Company shall contribute the full premium or subscription charge for

> Health Care (including Vision effective April 1, 1981) coverages continued in accordance with Article III, Section 6(b) only on behalf of a surviving spouse as defined in Article III, Section 6(b)(1), (2), (3) and (4) and in Article III, Section 6(c) (including for this purpose a surviving spouse who would receive survivor benefits under Article II, Section 6 of The Euclid, Inc., Hourly-Rate Employees Pension Plan except for receipt of survivor income benefits under Article II of this Program), and the eligible dependents of any such spouse...

(6th Cir. Appx. 225).

Article III, Section 6 of the Supplemental Agreements states:

> **Continuance of Health Care Coverages for Surviving Spouse of an Employee, or a Retire [sic] or Certain Former Employer**
>
> (b) The Corporation shall make suitable arrangements for a surviving spouse
>
> (1) of an employee or retired employee, (but not of a former employee eligible for a deferred pension) if such spouse is receiving or is eligible to receive a survivor pension benefit under Article II, Section 6 or 9(d) of The Euclid, Inc., Hourly-Rate Employees Pension Plan,
>
> (2) of a retired employee if, prior to his death, he was receiving a benefit under Article

II of The Euclid, Inc., Hourly-Rate Employees Pension Plan,

(3) of a former employee whose employment was terminated at age 65 or older for any reason other than a discharge for cause with insufficient credited service to entitle him to a benefit under Article II of The Euclid, Inc., Hourly-Rate Employees Pension Plan,

(4) of an employee who at the time of his death was eligible to retire on an early or normal pension under Article II of The Euclid, Inc., Hourly-Rate Employees Pension Plan, to participate in the Health Care (other than Vision prior to April 1, 1981) Coverage referred to in Section 1 of this Article; provided, however, that Dental Coverage shall be available to a surviving spouse age 65 or over only for months that such surviving spouse has the voluntary coverage that is available under the Federal Social Security Act by making contributions. Subject to availability of the coverages, such participation will be as a part of the groups covered.

(6th Cir. Appx. 262).

Article I, Section 3(b)(9) concludes:

(9) The Company shall pay the balance of the net cost of the Program as set forth in Article III over and above any employee contributions specified in Article III. It shall also pay any increase in such costs and shall receive and retain any divisible surplus,

> credits or refunds or reimbursements under whatever name, arising out of any such Program.

(6th Cir. Appx. 225). Pursuant to this paragraph, VCENA had the obligation to pay any increases in the cost of the insurance program.

Article I, Section 3(b)(7) of the Supplemental Agreements links health care coverage to pension eligibility:

> (7) For Retired and Certain Former Employees
>
> The Company shall contribute the full premium or subscription charge for Health Care (including vision effective April 1, 1981) coverages continued in accordance with Article III, Section 5 for:
>
> (i) a retired employee (including any eligible dependents), provided such retired employee is eligible for benefits under Article II of the Euclid, Inc., Hourly-Rate Employees Pension Plan and
>
> (ii) an employee (including any eligible dependents) termination at age 65 or older for any reason other than a discharge for cause with insufficient credited service to entitle him to a benefit under Article II of the Euclid, Inc. Hourly-Rate Employees Pension Plan.

(6th Cir. Appx. 224-225)

The courts below found that the promise contained in Article III, Section 5(a) of the Insurance Program Agreement that health benefits "shall be continued" after an employee retires "indicates an unambiguous intent for Plaintiffs' health care benefits to continue after the CBA terminated." Pet. Appx. 24a-26a. This conclusion was buttressed by the fact that Article I, Section 3(b)(7) linked retirees' health care benefits to pension eligibility – a status that lasts for life. Pet. Appx. 26a-28a.

In response to VCENA's argument under the CBA that some retirees could receive lifetime health coverage even if they were not eligible for a pension, the courts below recognized that this might create an ambiguity in the contract language that could warrant a review of evidence extrinsic to the CBA to discern the parties' intent.[8] Pet. Appx. 28a-29a.

The courts then looked to the contemporaneous Summary Plan Description which clearly and unambiguously provided for lifetime coverage, declaring:

> If you terminate employment with Euclid at age 65 or older for any reason other than discharge for cause, all of your Health Care coverages will be continued for the rest of your life without cost to you. Euclid also pays the full cost of

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[8] Although the only evidence extrinsic to the CBA cited by the courts below was the Summary Plan Description, there was also undisputed evidence from testimony of company officials that when employees retired they were told unequivocally that their benefits would be provided to them at no cost for life and that they could never be changed.

> Health Care coverages for surviving spouses and eligible children of deceased pensioners and of employees who die after they are eligible to retire voluntarily under the Euclid Pension Plan.

Pet. Appx. 29a-30a.

Citing the general duration clause out of context, VCENA asserts that "a clear reading of the Insurance Plan Supplement is that the benefits provided for therein were to terminate when the CBA terminated, i.e., on March 14, 1986." Pet. 7. However, as the courts below carefully analyzed the clause cited by VCENA, they concluded that the cited duration clause "does not reference either the insurance benefits or coverage. Consequently it is not clear that the instant duration clause was intended to terminate insurance benefits upon the termination of the CBA." Pet. Appx. 32a.

The courts went on to note that a "nearly identical" duration clause was contained in the Pension Plan agreement and VCENA admitted that the clause was never intended to terminate the Pension Plan at the end of the CBA, but "contends that the same language should have one meaning as to one benefit and an opposite meaning as to another benefit," a contention the courts below rejected. Pet. Appx. 33a-34a.

The courts below employed a similarly careful review of the CBA's promise of lifetime life insurance benefits. Article II, Section 3(b)(1) promises retirees "Continuing Life Insurance after Age 65." Pet. Appx. 40a-41a. Section 3(b)(3) states that "No employee contributions for Life Insurance are required after

attainment of age 65." Further, Article II, Section 3(b)(1)(i) provides that while the ultimate amount of life insurance will be reduced until the amount is 1 - 1/2% the amount in force on that individual's 65th birthday, "[s]uch remaining Life Insurance will be continued thereafter until the death of the employee." (6th Cir. Appx. 235).

The courts below concluded that, "[t]aken together, these two provisions [Article II, Section 3(b)(1)(ii) and Section 3(b)(3)] demonstrate that the CBA intended to provide lifetime, fully funded life insurance benefits to retirees." Pet. Appx. 41a. The courts rejected VCENA's arguments that VCENA either had reserved a right to terminate life insurance coverage or could limit the coverage to the duration of the CBA. Pet. Appx. 41a.

ARGUMENT

I. THERE IS NO SPLIT AMONG THE CIRCUITS

A. The Circuits Agree That No Automatic Presumptions Apply

VCENA's fundamental argument is that there is a three-way split among the circuits regarding the legal principles applied to determine whether non-pension retiree benefits are vested for life.

According to VCENA, (1) the Fourth, Sixth, and Eleventh Circuits hold, as announced by the Sixth Circuit in *UAW v. Yard-Man*, 716 F.2d 1476 (6th Cir. 1983), cert denied, 465 U.S. 1007, 104 S. Ct. 1002, 79 L.Ed. 2d 234 (1984), that there is a presumption that retiree benefits are vested for life, (2) the First,

Second, Third, Fifth, and Eighth Circuits hold, as announced by the Third Circuit in *UAW v. Skinner Engine Co.*, 188 F.3d 130 (3d Cir. 1999), that there is no presumption of vesting, and (3) the Seventh Circuit in *Rossetto v. Pabst Brewing Co.*, 217 F.3d 539 (7th Cir. 2000) holds that there is a presumption against vesting.

This so-called split simply does not exist. All courts agree that there is no presumption for or against vesting.

In order for VCENA to make its argument, it had to misrepresent the Sixth Circuit's 27-year-old *Yard-Man* decision and completely fail to cite its more recent decisions beginning with *Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571 (6th Cir. 2006), cert denied, *CNH Am. LLC v. Yolton*, 549 U.S. 1019 (U.S. 2006), which clarified any misconceptions that any party or court might have had about the *Yard-Man* analysis.

In *Yolton*, the Sixth Circuit stated flat-out that there is no presumption of vesting. The *Yolton* Court clarified the scope of the *Yard-Man* inference, stating that:

> [T]he inference functions more to provide a contextual understanding about the nature of labor-management negotiations over retirement benefits. That is, because retirement health care benefits are not mandatory or required to be included in an agreement, and because they are "typically understood as a form of delayed compensation or reward for past services" it is unlikely that they would be "left to the contingencies of future negotiations." *Yard-*

> *Man*, 716 F.2d at 1481-82 (citations committed). When other contextual factors so indicate, *Yard-Man* simply provides another inference of intent. **All that *Yard-Man* and subsequent cases instruct is that the Court should apply ordinary principles of contract interpretation.**

Yolton, 435 F.3d at 579-580 (6th Cir. 2006)(emphasis added).

As the Sixth Circuit stated in *Yolton*: "This Court has never inferred an intent to vest benefits in the absence of either explicit contractual language or extrinsic evidence indicating such an intent." *Id.* at 580.

Prior to *Yolton*, some courts mistakenly stated that the Sixth Circuit presumed that all collectively bargained retiree benefits were vested.[9] However, in *Yolton* the Sixth Circuit clarified that it, like all circuits throughout the country, looks to the language that creates the promise and applies ordinary principles of contract interpretation to determine whether the parties intended to create vested lifetime benefits.

This principle has been confirmed by the Sixth Circuit on at least six occasions since *Yolton*. *Reese v. CNH Am. LLC*, 574 F.3d 315 (6th Cir. 2009); *Schreiber*

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[9] For example, the Third Circuit characterized the Sixth Circuit's position on this issue in terms of a presumption in *Skinner*, 188 F.3d at 140 ("We cannot agree with *Yard-Man* that there exists a presumption of lifetime benefits...").

v. Philips Display Components Co., 580 F.3d 355 (6th Cir. 2009); *Cole v. ArvinMeritor*, 549 F.3d 1064, 1069 (6th Cir. 2008); *Noe v. PolyOne Corp.*, 520 F.3d 548 (6th Cir. 2008); *Prater v. Ohio Educ. Ass'n*, 505 F.3d 437 (6th Cir. 2007); and *Wood v. Detroit Diesel Corp.*, 213 Fed. Appx. 463 (6th Cir. 2007)(unpublished opinion).

VCENA's argument that the circuits disagree as to whether a presumption exists has long been laid to rest. Since *Yolton*, there have been only two relevant circuit cases, both of which agree there is no presumption of vesting.[10]

The First Circuit recognized the settled state of Sixth Circuit law on this question in *Senior v. NSTAR Elec. & Gas Corp.*, 449 F.3d 206, 217 (1st Cir. 2006), rejecting the claim that *Yard-Man* created a presumption in favor of vesting ("In *Yolton*, 435 F.3d 571 [(6th Cir. 2006)], the court said: 'All that *Yard-Man* and subsequent cases instruct is that the court should apply ordinary principles of contract interpretation. *Id.* at 580.'").

Similarly, the Fifth Circuit in *Nichols v. Alcatel*, 532 F.3d 364, 377 (5th Cir. 2008), applied ordinary principles of contract interpretation in the

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[10] VCENA cites to *Alday v. Raytheon Co.*, No. CV 06-32 TUC DCB, 2008 U.S. Dist. LEXIS 62747 (D. Ariz. Aug. 5, 2008) in an attempt to show that a district court case in the Ninth Circuit creates a circuit split. VCENA mischaracterizes the holding of this case. In *Alday* the court acknowledged that *Yard-Man*, as clarified by *Yolton*, contains no presumption of vesting. *Alday* looked to *Yard-Man* as the "contextual guide for interpreting CBAs." *Id.* at **16-18.

interpretative framework established by *Yard-Man* and *Yolton* (if a CBA is found to be ambiguous, extrinsic evidence may be introduced to determine parties' intent).

VCENA also argues that there is a split by attempting to extract an automatic presumption **against** vesting from Seventh Circuit retiree health care decisions. No such presumption exists.

As Judge Posner observed in *Rossetto v. Pabst Brewing Co.*, 217 F.3d 539, 544 (7th Cir. 2000), the only time a presumption would arise is in the atypical situation where a contract contains *no* language that could reasonably be construed to vest retiree benefits:

> Our presumption against vesting, it is important to emphasize, kicks in only if all the court has to go on is silence....The presumption is thus a default rule, that is, a rule to be applied when there is no other evidence.

This is not a presumption against vesting. This is simply recognition of the undisputed principle that "ERISA does not create any substantive entitlement to employer-provided health benefits." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995).

The extent to which retirees overall may have fared better in the Sixth Circuit than in the Seventh Circuit is directly related to the commonality of the underlying facts and collective bargaining agreements involved in the Sixth Circuit cases.

A majority of Sixth Circuit cases, due to geographical realities, arose out of auto industry

contracts, with their own distinct patterns and history.[11] If virtually identical contracts are negotiated by the same union in the same industry, one would hope and expect that the same outcome would be reached in each case, as it was here.

In contrast, the Seventh Circuit cases arise out of a more diverse group of industries—brewery,[12] electrical,[13] steel,[14] and auto,[15] each with its own pattern and history.

The difference in results reflects the difference in the industry contracts, not any substantive difference in the applicable legal standard. The Sixth Circuit does not have an outcome-determinative rule, as

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[11] *Cole v. ArvinMeritor*, 549 F.3d 1064 (6th Cir. 2008); *Yolton v. El Paso Tenn. Pipeline Co.*, 435 F.3d 571 (6th Cir. 2006), cert denied, *CNH Am. LLC v. Yolton*, 549 U.S. 1019 (U.S. 2006); *McCoy v. Merdian Auto Sys., Inc.*, 390 F.3d 417 (6th Cir. 2004); *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648 (6th Cir. 1996).

[12] See *Zielinski v. Pabst Brewing Co.*, 463 F.3d 615 (7th Cir. 2006); *Rossetto v. Pabst Brewing Co.*, 217 F.3d 539 (7th Cir. 2000); *Pabst Brewing Co. v. Corrao*, 161 F.3d 434 (7th Cir. 1998).

[13] *Barnett v. Ameren Corp.*, 436 F.3d 830 (7th Cir. 2006).

[14] *Murphy v. Keystone Steel & Wire Co.*, 61 F.3d 560 (7th Cir. 1995); *Senn v. United Dominion Indus., Inc.* 951 F.2d 806 (7th Cir. 1992).

[15] *Cherry v. Auburn Gear, Inc.*, 441 F.3d 476 (7th Cir. 2006); *Diehl v. Twin Disc., Inc.*, 102 F.3d 301 (7th Cir. 1996); *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603 (7th Cir. 1993).

evidenced by the fact that retirees frequently fail in the Sixth Circuit.[16]

B. All Retiree Benefit Cases Turn on All Relevant Facts, Not on the Presence or Absence of Talismanic Words or Phrases.

1. VCENA's "Shall be Continued" Argument

VCENA argues that circuits differ on whether the words "shall be continued" automatically vest benefits. The answer from the circuits, not surprisingly, is that it depends on the factual context.

VCENA argues that the Sixth Circuit's decision in *Cole v. ArvinMeritor, Inc.*, 549 F.3d 1064 (6th Cir. 2008), the First Circuit's decision in *United Steelworkers of Am., AFL-CIO v. Textron, Inc.*, 836 F.2d 6, 10 (1st Cir. 1987), the Third Circuit's decision in *Skinner* and the Seventh Circuit's decision in *Senn v. United Dominion Indus., Inc.*, 951 F.2d 806 (7th Cir. 1992) adopted conflicting rules with respect to the same retiree health care provisions. A cursory review of the cases shows that the language examined in each of the cases was dramatically different.

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[16] See, e.g., *Harps v. TRW Auto.*, No. 09-3214, 2009 U.S. App. LEXIS 24242, *13-14 (6th Cir. Nov. 3, 2009)(unpublished opinion); *Mauer v. Joy Techs., Inc.*, 212 F.3d 907, 919 (6th Cir. 2000)(summary judgment against certain retirees); *Bittinger v. Tecumseh Prods. Co.*, 201 F.3d 440 (6th Cir. 1999); *UAW v. Cleveland Gear Corp.*, No. 83-3839, 1984 U.S. App. LEXIS 13700 (6th Cir. Oct. 24, 1984)(unpublished opinion).

In *Cole*, like the instant case, the CBA language stated health care coverage an employee had "at the time of retirement...shall be continued thereafter" for retirees and "any eligible dependents." *Cole*, 549 F.3d at 1068. In *United Steelworkers of Am., AFL-CIO v. Textron, Inc.*, 836 F.2d 6, 10 (1st Cir. 1987), the CBA said that the company "shall pay" for retiree life insurance and that medical benefits "shall be provided" to union members who retire. The CBAs at issue in *Cole* and *Textron* specifically refer to health benefits continuing and being provided during retirement.

In *Skinner*, the CBA provided that the company "will continue to provide" specific medical coverage. 188 F.3d at 135. The Third Circuit noted, however, that this language had been changed from contract to contract depending on whether the new contract continued previous coverage or changed the previous scope of coverage. If the latter, the contract contained the words "would be instituted," for example, rather than "will continue." The Third Circuit found, based on this unique bargaining history, the words "will continue" referred to coverage, not to duration. 188 F.3d at 142-143. The Third Circuit also relied on the fact that the purported retiree health care language did not specifically mention retirees at all:

> the CBA provisions make no material distinction between active employees and retirees in this regard. The only reasonable conclusion—if one begins with the uncontroversial premise that benefits for active

> employees were not vested—is that benefits for retirees were likewise not vested.

Id. at 144.

After examining other parts of the CBA and the bargaining history described above, the Third Circuit in *Skinner* determined that the contract provisions were not ambiguous and held, based on the particular facts described above, that the benefits were not vested. *Id.* at 147.

VCENA claims that the Seventh Circuit in *Senn* applied yet a third outcome-determinative rule to "will continue" contract language. In fact, as the Seventh Circuit later pointed out in *Bidlack v. Wheelabrator*, 933 F.3d at 608, the language in *Senn* did not merely say that retiree benefits "will continue":

> The language in *Senn* was weaker: it was that the company "will continue for retired employees" a specified premium contribution. And the final agreement between the company and the union in that case, which could be thought declaratory of earlier understandings, said that coverage "shall be continued during the *term of this agreement*."

As the circuit decisions cited by VCENA above show, neither the Sixth Circuit in *Cole*, nor the First, Third or Seventh Circuits based their decisions on a myopic reading of the phrase "shall be continued." Rather, all the circuits to address retiree health care disputes arising from CBAs have applied traditional rules of contract interpretation to the unique facts of each case.

2. VCENA's Pension Linkage Argument

VCENA next asserts that courts below found it unduly significant that the CBA contained language linking the Retirees' health and life insurance benefits to pension eligibility. To the contrary, the courts below did not rely on the linkage of Retirees' health care benefits to pension eligibility as the determinative factor, but simply articulated that the linking of benefits supported the plain reading of the contract language that unambiguously vested benefits.

Regardless, the cases cited by VCENA, *Joyce v. Curtiss-Wright Corp.*, 171 F.3d 130 (2d Cir. 1999) and *Vallone v. CNA Fin. Corp.*, 375 F.3d 623 (7th Cir. 2004), are not at all inconsistent: a review of the facts shows that the decisions turned on very different written provisions.

In *Joyce* and *Vallone*, the courts rejected vesting claims because explicit reservation of rights clauses gave the employers the right to modify their benefits. In *Joyce*, the Second Circuit rejected a vesting argument where a summary plan description given to retirees specifically stated that their retiree medical benefits "are not contractual in nature, and they may be modified from time to time or terminated as a result of contractual negotiations."[17] 171 F.3d at 132. In *Vallone*, the Seventh Circuit examined a plan unilaterally promulgated by the employer. The plan documents contained a reservation of rights provision which stated that retiree coverages "may be amended,

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[17] See *Joyce v. Curtis-Wright Corp.*, 992 F. Supp. 259, 263 (W.D.N.Y. 1999), setting forth factual details.

revoked, or suspended at the Company's discretion at any time, even after your retirement." 375 F.3d at 636.[18]

3. VCENA's Durational Clause Argument

VCENA argues that the Seventh and Eighth Circuits have reached different interpretations of durational clauses than the Sixth and Eleventh Circuits, which have held that a general durational clause in the CBA did not preclude vesting of retiree health care benefits. There is no conflict among these decisions.

In *Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d 1512, 1513 (8th Cir. 1988), cited by VCENA, the CBA specifically provided that retiree insurance coverage could be "amended, modified or supplemented in collective bargaining agreement between the parties." The Eighth Circuit predictably concluded those benefits could be modified. 836 F.2d at 1514-1515.

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[18] The Seventh Circuit's *Vallone* decision was also based on the court's finding that the plan documents granted the company discretion in interpreting the plan, and that the company's interpretation must therefore be upheld unless it was arbitrary and capricious, as held in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). 375 F.3d at 631-632. This grant of discretion is typical of unilaterally-promulgated benefit plans and rare in collectively bargained plans. Disputes arising from CBAs therefore, are typically reviewed under a *de novo* standard under which the employer and retiree interpretations of applicable retiree health care provisions are entitled to equal weight. *See* discussion *infra* pp. 27-28.

In *Murphy v. Keystone Steel & Wire Co.*, 61 F.3d 560, 567 (7th Cir. 1995), the plan stated that retiree benefits terminated "upon the date the Plan is terminated or amended to terminate the Retiree's [or his dependent's] coverage." The Seventh Circuit held this "express termination language is plainly inconsistent with any intent to vest benefits." *Id.*

The Sixth Circuit agrees with the Seventh and Eighth Circuits–when a durational clause is retiree-benefits specific, those benefits can be terminated after the CBA expires. *Harps v. TRW Auto.*, No. 09-3214, 2009 U.S. App. LEXIS 24242, *13-14 (6th Cir. Nov. 3, 2009)(unpublished opinion)(operative language of "[t]his clause shall not be construed to convey any rights to those beyond the term of this agreement" which concluded the retiree medical benefits section of the CBA, unambiguously disclaimed employer obligation to provide benefits beyond the term of the CBA).

The Eleventh Circuit follows the other circuits, in that unless there is a provision that terminates benefits upon the expiration of a collective bargaining agreement, language that individuals receiving benefits "shall not have such coverage terminated or reduced so long as the individual remains retired from the company or receives a surviving spouse's benefits, notwithstanding the expiration of this [basic] agreement" is a clear intent that benefits survive after a CBA terminated. *United Steelworkers of Am., AFL-CIO-CLC v. Connors Steel Co.*, 855 F.2d 1499, 1504 (11th Cir. 1988); *See also Carriers Container Council, Inc.*, 896 F.2d 1330, 1339 (11th Cir. 1990)(a general durational clause that lacks a "cutoff date" for benefits does not terminate vested retiree benefits).

The general durational clause examined by the courts below in the instant case does not mention retirees and contains no statement that retiree benefits could be terminated or modified by subsequent negotiations. It is simply not possible to conjure a conflict between the Sixth, Seventh, Eighth and Eleventh Circuits.

C. No Circuit Split on How Collectively-Bargained and Unilaterally-Provided ERISA Benefit Cases Are Treated

VCENA's quest for a circuit conflict includes its argument that some circuits analyze vesting claims arising out of non-bargained retiree health care plans by a more stringent standard than claims under collectively bargained plans.[19] As shown below, VCENA is incorrect.

The applicable standard in all retiree vesting claims is whether the parties intended to provide vested, lifetime benefits. The task of courts analyzing collectively bargained plans is, of course, slightly different than the analytic task of courts examining unilaterally-drafted plans. In the former situation, the courts must determine the intent of union and company bargainers in arms-length labor negotiations, applying the tools the courts have developed to determine intent in that context. In the latter situation, the courts need only determine whether *one* party, the employer, intended to waive its right to

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[19] This case involves a collectively bargained contract, and therefore is not a useful vehicle for examining retiree health care claims under non-bargained plans.

terminate benefits. Thus, one would expect that as a factual matter, retirees claiming vested rights arising out of unilateral plans would generally fare worse in the nations' courts than retirees claiming vested benefits under collective bargaining agreements.

This expectation is borne out in the case law. Not surprisingly, the facts in cases involving plans drafted unilaterally by employers typically demonstrate, unequivocally, that the employer did not intend to waive its right to terminate retiree benefits. Employers who unilaterally promulgate their plans, unlike employers who must negotiate a collective bargaining agreement with a union, are free to insert ironclad reservation of rights into the governing documents.[20] *See Balestracci v. NSTAR Elec. & Gas Corp.*, 449 F.3d 224, 232 (1st Cir. 2006)(benefits were not vested when there is express language that a company reserves the right to amend, modify or terminate even promises for lifetime benefits); *In re Unisys Corp. Retiree Medical Benefit "ERISA" Litig.*, 58 F.3d 896, 900 (3d Cir. 1995)(retiree benefits not vested despite summary plan description that contained the phrase "when you retire, your medical benefit will be continued for the rest of your life" because of employer's reservation of rights clause to change or terminate benefits at any time); *Vallone v. CNA Fin. Corp.*, 375 F.3d 623, 636 (7th Cir. 2004)(reservation of rights provision allowed company to amend, revoke or suspend retiree benefits at the

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[20] Similarly, employers drafting unilateral plans are free to grant themselves interpretive discretion, which means that the employer's denial of a vesting claim is reviewed by the courts under a deferential arbitrary and capricious standard. *See* footnote 18, above.

discretion of the employer at any time, even after employees retired). These factual differences distinguish vesting cases arising out of non-bargained plans from vesting claims based on collective bargaining agreements.[21]

The three cases involving retiree vesting claims under non-bargained plans cited by VCENA further demonstrate the point. In each case, the vesting claim was dismissed because the employer drafted the unilateral plan to include a reservation of rights clause retaining its right to modify or terminate the benefits. *See Sprague v. General Motors Corp.*, 133 F.3d 388, 401 (6th Cir. 1998); *Gable v. Sweetheart Cup Co.*, 35 F.3d 851, 856 (4th Cir. 1994); *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1513 (10th Cir. 1996).

Prior to the Sixth Circuit's decision in *Yolton*, some circuits believed that the Sixth Circuit applied a presumption in favor of vesting in collectively bargained cases and on that basis indicated that a different legal standard might apply with respect to non-bargained plans. Petitioner cites several of those pre-*Yolton* cases. See, for example *Rossetto*, 217 F.3d at 543 (7th Cir. 2000). It is now clear, however, that no presumption is applied by the Sixth Circuit, and that the Sixth Circuit requires express language or adequate extrinsic evidence to uphold any retiree vesting claim, regardless of whether the benefits were

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[21] In the instant case, it is undisputed that there was no reservation of rights clause contained in either the CBA or the summary plan description.

unilaterally promised or collectively bargained. *See* 435 F.3d at 579.[22]

II. THE DECISIONS BELOW ARE CONSISTENT WITH DECISIONS OF THIS COURT

VCENA argues that the Sixth Circuit's decisions are in conflict with this Court's decisions in *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995) and *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359 (1980) because the Sixth Circuit allegedly does not recognize the difference between discretionary welfare benefits and the mandatory vesting provisions applicable to pension benefits under ERISA. Pet. 23-24.

This characterization is squarely contradicted by the express language throughout the Sixth Circuit's

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[22] The only post-*Yolton* case cited by VCENA in support of this argument, the unpublished 2006 decision in *Trull v. Dayco Prods.*, No. 04-2109, No. 05-1591, 178 Fed. Appx. 247; 2006 U.S. App. LEXIS 10640 (4th Cir. Apr. 28, 2006), merely emphasizes that there are inherent factual differences between bargained and non-bargained cases. The latter type of case, the *Trull* court noted, involves, "....an employer's waiver of 'its statutory right to modify or terminate benefits. . . by voluntarily undertaking an obligation to provide vested, unalterable benefits'" rather than rights arising out of collective bargaining agreements. *Id.* at 250. In *Trull*, a collective bargaining case, the employer and the union bargained language which specifically stated that the agreement was not intended to waive, modify, or limit retirees' rights to medical benefits. The *Trull* court contrasted this with the Fourth Circuit's decision in *Gable v. Sweetheart Cup Co.*, 35 F.3d 851 (4th Cir. 1994), a non-bargained case which included the usual reservation of rights clause permitting termination of benefits. *Id.* at 856.

jurisprudence. As the Sixth Circuit stated in *Reese v. CNH*, and a multitude of cases before it:

> ERISA makes a promise to pay a covered "pension" binding at retirement, 29 U.S.C. § 1053(a), but it exempts "employee welfare benefit plans" from this requirement, *see id.* § 1051(1). Thus, while ERISA heavily regulates promises to provide pension benefits, health benefits are purely a matter of contract--permitting a company to guarantee health benefits for life or to make them changeable, or even terminable, at the will of the company.

574 F.3d at 321 *citing Noe v. PolyOne Corp.*, 520 F.3d 548, 552 (6th Cir. 2008) and *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 400 (6th Cir. 1998); *See also Schreiber v. Philips Display Components Co.*, 580 F.3d 355, 363 (6th Cir. 2009); *Helwig v. Kelsey Hayes*, 93 F.3d 243, 248 (6th Cir. 1996).

VCENA proposes, in effect, that all courts should abandon traditional contractual analysis, which seeks to determine the intent of the parties to CBAs, and instead adopt a conclusive rule regardless of what the evidence as to the parties intent actually is. VCENA cites *Litton Fin. Printing v. NLRB*, 501 U.S. 190 (1991) in support of this proposal.

The *Litton* decision, to the contrary, endorses the traditional approach to contractual interpretation adopted by the circuits in retiree health cases arising under a CBA. *Litton* addressed the question of whether a dispute (unrelated to retiree health care) which arose after the termination of a CBA was arbitrable under that agreement's grievance procedure. In *Litton*, the

Court stated that whether the rights continue beyond the termination of a CBA is "determined by contract interpretation. Rights which accrued or vested under the agreement, will, as a general rule, survive termination of the agreement." 501 U.S. at 207.

CONCLUSION

For the reasons set forth above, VCENA's request for review should be denied.

Respectfully Submitted,

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